The Working Balance of the American Political Departments

By CHARLES L. BLACK, JR.*

OUR government has been called one of checks and balances. I propose to put forward here some thoughts about the balancing of power, as it has actually worked among us.

The United States President has been called the most powerful officer in the world. A great deal about the working process of balance in our government can be learned if we start by considering the constitutional foundation for the power of the president. Nearly all the material is in Article II.

I pass over for a moment the question whether the grant of "executive power" is one of substance.[1] Let us consider first what powers are specifically enumerated. It will be convenient to classify these in three categories—those which are wholly or nearly without substance; those which on the face of things lie totally in control of the Senate; and those which have at least the sound of substance and of independence, but which, with one exception, in fact are very significantly subject to control by Congress.

I would categorize as without significant substance the president's right to require the opinion, in writing, of any cabinet officer, with respect to a matter within that officer's jurisdiction,[2] and his power, or duty, to give Congress a State of the Union message from time to time.[3] I would class as trivial, if not altogether insubstantial, his powers to convene and (in extraordinary circumstances) to adjourn Congress, and his formal duty to commission all the officers of the

---

* Luce Professor of Jurisprudence, Yale Law School. Professor Black's paper was delivered at the Symposium on Power and Morality: The Present Constitutional Dilemma, conducted by the Yale Law School and Yale Philosophy Department, Jan. 31, 1974.

1. U.S. CONST. art. II, § 1, cl. 1. See note 3 *infra.*
2. U.S. CONST. art. II, § 2, cl. 1.
3. U.S. CONST. art. II, § 3.

United States.[4] Nor is there much substance in the power to fill vacancies during a senatorial recess, though once in a while it may be of importance.[5]

Under absolute control of the Senate, the president has the power to make treaties (though this requires concurrence of two-thirds of the Senators present) and (with majority Senate concurrence) to appoint ambassadors, judges, and other officers.[6] Senatorial control over the appointment process is real, and could at will be made much more throughgoing than is our current custom. Some judicial officers are, in effect, even now appointed by Senators. The Senate has been quite independent about Supreme Court justices and about treaties. When the Senate did not, for policy reasons, want an ambassador to go to the Vatican, it indicated it would not confirm General Mark Clark, as unexceptionable an appointment, on grounds of personal merit, as could have been made. The Senate could do something like this any time it wanted.

There remain the quite few powers having what I have called the sound of independence. These are either four or five in number. The numerical ambiguity is located in the power (or as it reads more naturally, the duty)[7] to receive ambassadors. This sounds like a formal function rather than a power; I am inclined to think it was originally so conceived. The power (again actually expressed as a duty) to take care that the laws be faithfully executed is entirely dependent on the laws.[8] The other three are powers in literal expression and tenor: the commandership-in-chief,[9] the veto power[10] and the pardoning power.[11]

Now to take these in changed order, the veto power is wholly in the hands of Congress.[12] Had Congress been so minded, it might early have established for itself a convention of automatically voting to override all vetoes. This would not have been surprising, even though it would have required some members to vote against their convictions on the merits of single questions, or to be absent, a more likely solution. In perfect constitutional form, it would have estab-

4. U.S. CONST. art. II, § 3.
5. U.S. CONST. art. II, § 3, cl. 3.
6. U.S. CONST. art. II, § 2, cl. 2.
7. U.S. CONST. art. II, § 3.
8. U.S. CONST. art. II, § 3.
9. U.S. CONST. art. II, § 2, cl. 1.
10. U.S. CONST. art. I, § 7, cl. 2.
11. U.S. CONST. art. II, § 2, cl. 1.
12. U.S. CONST. art. I, § 7, cl. 2, 3.

lished the total supremacy of Congress as a whole—a development in the long-run interest of virtually every individual member. It would be altogether out of the question in Britain for any refusal of royal assent to a passed Bill to be supported on party grounds, or on grounds of any member's view of the particular merits of the question, and it would have been quite possible for the same attitude to have grown up here.

The commandership-in-chief would not have been quite so simple to deal with. But it coexists in the Constitution with the congressional powers to raise and maintain armed forces,[13] to declare war,[14] to make rules for the government and regulation of the armed forces,[15] and to deal extensively with the militia.[16] A commandership-in-chief that is at the mercy of such an array of powers is nakedly vulnerable to reduction in scope and authority.

There remains the pardoning power. As an *ultima ratio* it might, at times, have some utility, but as an instrument of governing it evidently has none.

Now that is the lot. That is all. What is in the balance on Congress' side?

The answer is just about everything. The powers of Congress are adequate to the control of every national interest of any importance, including all those with which the president might, by piling inference on inference, be thought to be entrusted. And underlying all the powers of Congress is the appropriations power,[17] the power that brought the kings of England to heel. My classes think I am trying to be funny when I say that, by simple majorities, Congress could at the start of any fiscal biennium reduce the president's staff to one secretary for answering social correspondence, and that, by two-thirds majorities, Congress could put the White House up at auction. But I am not trying to be funny; these things are literally true, and the illustrations are useful for marking the limits—or the practical lack of limits—on the power of Congress over the president. Last year, in an appropriations bill, they told him to stop bombing Cambodia by August 15,[18] and he stopped. If the will had existed, they could

13. U.S. CONST. art. I, § 8, cl. 12, 13.
14. U.S. CONST. art. I, § 8, cl. 11.
15. U.S. CONST. art. I, § 8, cl. 14.
16. U.S. CONST. art. I, § 8, cl. 15, 16.
17. U.S. CONST. art. I, § 9, cl. 7.
18. Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130.

have done much the same thing four, or six or eight tragic years ago—at any time they really had wanted.

The only thing I have left out of account so far is the general "executive power" with which Article II begins. I think there probably is some interstitial and ancillary power here,[19] and I think also that the whole of Article II suggests some implied power to protect the internal conduct of the presidency itself; though I have gotten myself in a lot of trouble on this lately, I have said nothing I wish to unsay. Concretely, the "executive privilege" controversy did not concern affirmative presidential power to act on people or events; it concerned, rather, the power of the judiciary. But, whatever you may think of this, neither of the things I have mentioned here importantly defines a powerful office.

What kind of a balance, then, is this? On the face of the Constitution, to summarize, the president is virtually powerless in opposition to a resolute Congress. In what sense is there a balance between these branches?

The answer is not mysterious. The president gets virtually all his power *from* Congress—by its looking to him for initiative even as to legislation, by its accustomed acquiescence in his dubious power claims, and above all by its continual and still continuing delegation of power to him. Why does this occur?

The answer seems to lie in the structure of the two branches rather than in the constitutional text.

Congress, on the other hand, is made by the law of its constitution into a body that cannot be organized actually to govern. This is so for two reasons.

The first is the firm territorial base and constituency to which each congressman and each senator looks for continuance in office. The Congressman from the Twenty-fifth Texas (of course an imaginary district) may be disciplined to some extent by the leadership of his party in the House; his committee assignments may not be to his liking, and the campaign committee may not help him much at the next election. But he lives and dies on what they think of him in

19. I have in mind the sort of thing the Court approved in United States v. Midwest Oil Co., 236 U.S. 459 (1915). (President Taft, in literal violation of an act of Congress, but, as he put it, "in aid of proposed legislation," withdrew certain public oil lands from sale.) *See also* Black, *The Crisis in Capital Punishment*, 31 MD. L. REV. 289, 307-10 (1971), in which I contend that the president ought to be held to have power to stay executions for a short time, to give Congress a chance to act on the death penalty question, if a situation calling for such action were to arise. The executive power does not have to be either a nullity or a vast reservoir of power.

the Twenty-fifth Texas. Keeping a majority in the Twenty-fifth Texas is both the necessary and the sufficient condition of his staying in office. Most important of all, there is no Edward Heath, or Harold Wilson, who can tell him that he may not run from the Twenty-fifth Texas any more. (I often think of this when people compare the vulnerability of the British prime minister to what they fancy to be the untouchability of the president; I am sure any American president would be happy indeed to settle for the power of a British prime minister who has come in with a firm majority.)

Of course, what I have said about the House is equally true, *mutatis mutandis*, of the Senate. All men and women in both Houses of Congress are tied to a territorial base, all-important to them, of which no party leadership has any real power to deprive them. You cannot effectively organize people so based into a directed instrument for government.

My second point (which I seem to recall owing to Professor Corwin) makes this doubly sure. For the bicamerality of the American Congress is indelibly established, and if you could (as seems impossible) fully organize either or both Houses, you still would have the job of getting them to march together.

I am not saying that this could never happen, though I know of no case where it has happened, at least since Reconstruction, except under presidential leadership of the highest prestige—and that is another thing altogether. What I do say is that, in its dispersed territoriality of power-bases and in its bicamerality, Congress is almost ideally structured for resistance to tight organization. The contrast with the British Parliament is absolute.

On the other hand, the presidency—an office with very little firm power under the Constitution—is ideally *structured* for the receipt and exercise of power. Congress is a personification; the president is a person. The congressman, unlike the member of Parliament, can be disciplined little if at all; the president's people come and go as he nods or frowns.

And what very naturally has happened is simply that power textually assigned to and at any time resumable by the body structurally unsuited to its exercise, has flowed, through the inactions, acquiscences, and delegations of that body, toward an office ideally structured for the exercise of initiative and for vigor in administration.

The balance lies in the paradox. Power moves, in great loadings, away from its warranted possessors, a most unwonted thing in poli-

tics. But all know, in full consciousness or in the back of their minds, who originally had this power and who can take it back if the pressure to do so increases sufficiently. Congress may wish to delegate power concerning something called "energy", which seems to mean little less than "life", to a president it is actually thinking of impeaching.[20] Congress may, in a so-called "war powers" bill, virtually concede to the same president the power to start war as he may see fit, utterly refusing even to begin the task of defining those conditions under which the president should not commit troops for ten minutes—the really crucial matter.[21] But still, back there somewhere, all the parties to this know that Congress, given the will, could put the White House up at auction.

Now I think this working balance in our government is on the whole a good thing. In theory, it is wonderful that the primarily empowered body is so structured as to be unable to wield power, while the office structured to wield power must get its power, revocably, from the outside. Ideally, this balance ought to assure that power will be exercised with vigor and skill, but without an accompanying feeling of invulnerability in the event of abuse. I wonder if they thought of this in Philadelphia; could it be what they meant by "legislative" and "executive"?

Not quite, I think. The process has gone too far; the balance evidently needs redressing. And while nothing could be more foolish than to restructure the presidency so as to make it fit an incumbent deeply distrusted, the present circumstances may afford a chance for some prudent and measured redressing.

I would start at the beginning—by Congress's resuming its functions of creative initiation. Congress may not be amenable to discipline, but it is full of thoughtful and energetic people, quite adequate in numbers and ability to the forming of legislation programs.

20. H.R. Con. 793, 93d Cong., 2d Sess. (1974) (vetoed by President Nixon Mar. 6, 1974).

21. The War Powers Resolution, Act of Nov. 7, 1973, Pub. L. No. 93-148, 87 Stat. 555, achieves this negative result by a series of puzzling repugnancies and contradictions which are too tedious to analyze here. Briefly, § 2(c), though in an unprecedented verbal form which leaves doubt as to what is being said, seems to cut the independent presidential power almost to zero. Then § 8(d)(1) seems to restore the previous position—whatever that may have been. In between, there is set up a series of reporting and ratifying or disaffirming procedures which would have no utility or meaning except on the assumption that the president may sometimes—but we are not told when—commit forces without *prior* authorization or actual enemy attack. This confusion is compounded by the legislative history. See the remarks of Congressman Eckhardt, 119 CONG. REC. H6225 (daily ed. July 17, 1973).

Congress ought to insist on receiving help from the executive branch in its exercising this function, but without dictation. And it ought to reorganize its committees into organs capable of true initiative and creativity.

Secondly, Congress ought to develop a simple taboo on delegation to the president of power to make total policy with respect to matters of prime national concern. I turn here to the recent war powers resolution. Reading this document, the most conscientious of presidents would have to conclude that Congress, after full consideration, had quite consciously left him no alternative to acting altogether on his own views of policy and constitutionalism.[22] This action of Congress is excusable only if there is nothing—absolutely nothing—which can be said in advance with respect to the wisdom or lawfulness of independent presidential military actions. And if that is so, how could any president ever be faulted for what he did?

Many other innovative actions are possible. Several days after the secretary of state said that the war powers bill might authorize a resumption of bombing in Cambodia, Congressman Eckhardt of Texas introduced a one-sentence resolution of the following tenor:

> Resolved by the House of Representatives (the Senate concurring), that any renewal of United States military involvement in Southeast Asia will constitute a gross abuse of Presidential powers raising grave questions under article II, section 4, of the United States Constitution.[23]

The theory of this resolution is interesting. It might be, in a way, the beginning of a corpus of congressionally defined law on impeachment. And why should Congress not make an attempt to define at least some impeachable presidential offenses?[24] Is it better to let the professors keep arguing decade after decade, or would it not be better, and much fairer, for the bodies which must at last responsibly

22. See note 5 *supra.*

23. H.R. 391, 93d Cong., 1st Sess. (1973).

24. The staff of the House of Representatives Committee on the Judiciary recently submitted a report on presidential impeachment. STAFF OF THE IMPEACHMENT INQUIRY, HOUSE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., CONSTITUTIONAL GROUNDS FOR IMPEACHMENT (Comm. Print 1974). I mean neither to endorse nor to disapprove this report in what I have said here. My proposal deals with Congress' defining *prospectively* those acts which would constitute impeachable offenses on the part of the president. *E.g.*, Congress itself should lay down guidelines on "impoundment". In the form of the concurrent resolution, not subject to veto, these would not strictly have the force of law, but they would fairly warn a president of Congress' view. If (as I think is not true) such guidelines cannot be formulated, then how can a president be said, after the fact, to have done wrong in *any* improvement?

construe the "high crimes and misdemeanors" phrase—the House and the Senate—to register their sense of its meaning?

Let me pull back to summarize my main thesis. On paper, and as a matter of irreducible minimum, the presidency is an office of very little uncontrollable power. Congress, on the other hand, holds virtually all the national power, if only it wants to keep or to resume it—including virtually total power over the presidency. But Congress is very poorly structured for initiative and leadership; the presidency is very well structured for these things. The result has been a flow of power from Congress to the presidency. On the whole, this is both inevitable and good. As with so many defects in government, the trouble with it is that it has gone somewhat too far. Consciousness of what has happened and is happening ought to help Congress recover from the near-automatism of acquiescence and delegation, and selectively to reassert its own power. All that is wanted is the intelligent will to start this process. The one fundamental error is that of supposing that the modern expansion of presidential power is based on the Constitution by itself, and is hence inaccessible as a matter of law to congressional correction.